

NO. 47861-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondent.

**APPELLANTS' ANSWER TO AMICUS CURIAE BRIEF OF
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY**

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I. INTRODUCTION

Appellants Pope Resources, LP and OPG Properties, LLC (“PR/OPG”) support the standard for “operator” liability advocated by the State of Washington, Department of Ecology (“Ecology”). Ecology’s standard is consistent with the plain language of the phrase “exercise *any control* over the *facility*.” Ecology’s standard also recognizes that the terms “owner” and “operator” are defined together without clear distinction between the two. PR/OPG respectfully submits this answer to clarify the appropriate application of this standard to the extent that Ecology suggests DNR and other “managers” of property would not be liable in the absence of a lease or a similar act.

If a person with land management authority knows (or should know) of an unauthorized use of its land and ignores the use, then that person has “exercise[d] any control” over the facility by choosing to permit the use. This standard recognizes the reality that ignoring a known use is no different than granting formal authorization for that use. Moreover, this standard is consistent with MTCA’s plain language and avoids incentivizing acquiescence.

The Court should therefore adopt Ecology’s standard but confirm that DNR is liable for its leasing activities *and* its conscious acquiescence. Such a holding would avoid incentivizing DNR and other land managers

to ignore their responsibilities, as discussed below. Such a holding would also promote judicial efficiency by avoiding the inevitable future dispute over whether DNR or another land manager can be liable when it does not execute a lease.¹

II. ANSWER

Ecology takes the position that “where a state agency merely holds the statutory authority to manage land under State title, without affirmatively undertaking active management of the property (*e.g.*, in a proprietary role, such as through leasing), the agency is not liable as an ‘owner or operator’ under MTCA.” Ecology’s Am. Br. at 6 n.3. While it may be true in some instances that such a state agency (or other person) would not be liable, DNR would be liable at this Site regardless of whether it had ever leased part of the Site to Pope & Talbot (“P&T”).

As Ecology points out, an “owner or operator” includes any person who “exercises *any control*” over a “*site or area* where a hazardous substance has come to be located.” Ecology’s Am. Br. at 6 (citing RCW 70.105D.020(22)(a), .020(8)(b) (emphasis added by Ecology)).²

¹ See, *e.g.*, *Fria v. Washington State Dep’t of Labor & Indus.*, 125 Wn. App. 531, 533, 105 P.3d 33 (2004) (reaching issue on merits of case while acknowledging that the case could be decided on procedural grounds where the issue could “easily be resolved as a matter of law”); *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987) (deciding issue “in the interest of judicial economy . . . [r]ather than wait for th[e] issue to be raised in a subsequent appeal”).

² Under MTCA’s joint and several liability scheme, a party who is liable for any part of the site is liable for the entire site. See Ecology’s Am. Br. at 4; 6-7 (“Based on MTCA’s

PR/OPG agrees with Ecology that DNR unquestionably “exercise[d] any control” when it leased to P&T—particularly considering that the lease was for log storage activities plainly designed to support the broader mill operations. But Ecology overlooks the fact that DNR ignored P&T’s massive, conspicuous, and widespread use of DNR land in Port Gamble Bay for decades before ever requiring a lease.³ Once DNR finally required P&T to enter a lease, the agency inexplicably leased only a small portion of its land that P&T used.⁴ DNR had direct knowledge of P&T’s unauthorized activity in other areas and knew that these uses caused pollution.⁵ DNR discussed internally that it should require P&T to lease these other areas, but it ultimately chose to look the other way.⁶

DNR could just as easily have chosen not to lease any area of the Site, despite its knowledge of P&T’s actions. Thus, a standard that requires leasing or a similar act as a condition precedent to liability would create troubling precedent. Notwithstanding the lease, DNR and other

plain language, a lessor of land within a facility is an “owner or operator” of that facility.”).

³ CP 78 (describing scale and details of P&T’s operations throughout the Bay); CP 99-101 (communications between DNR and P&T in 1911 showing DNR knew it was selling Port Gamble tidelands to a company that conducted mill operations at the site); CP 103-106 (first lease in 1974).

⁴ CP 108 (stating size of lease area).

⁵ CP 124; 136-38 (1991 DNR memorandum and related photographs stating that P&T used land without authorization and should be required to lease); CP 134 (1991 internal communication acknowledging that “bark [from log storage] can cause bad problems” and suggesting that “issue” of “contamination” should be dealt with “next time around”).

⁶ CP 124.

proprietary land managers with knowledge of unauthorized uses must still be liable under MTCA for two primary reasons. First, it would be inconsistent with MTCA's plain language to require leasing before imposing liability because a person who chooses to allow an unauthorized use without a lease "exercises any control" over the property. Second, a standard that requires leasing or a similar act before imposing liability would simply encourage land managers to ignore unauthorized uses as a way to escape MTCA liability.

A. DNR is Liable under MTCA's Plain Language for Choosing to Allow Pollution by Ignoring It.

MTCA's plain language encompasses a person with management authority who knows (or should have known) of contaminating activity but looks the other way.⁷ Again, MTCA requires the "exercise[]" of any control." Control is the "power or authority to manage, direct, or oversee." Black's Law Dictionary (10th ed. 2014). To exercise is to "make use of." *Id.* DNR "made use" of its "authority or power" to restrict or authorize the use of land by affirmatively choosing to ignore unauthorized polluting uses.⁸

⁷ It is important to focus both on what a person actually knows and should have known. If only actual knowledge of unauthorized uses could lead to liability, then DNR and others may simply turn a blind eye to information that could lead to actual knowledge of the use.

⁸ On the other hand, a person with no knowledge or reason to know does not "exercise" its control by failing to require a lease. Such a person has not made a "decision" or

Ignoring a known unauthorized use is no different than granting formal authorization for that use. It would be absurd to interpret the statute as distinguishing so sharply between these two scenarios, and the Court has a “duty to avoid absurd results.”⁹ *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 433, 275 P.3d 1119 (2012). Once a person with management authority knows (or should know) of an unauthorized use, that person *exercises* its authority to restrict or authorize by allowing the continued use. Thus, to the extent Ecology suggests that granting formal authorization results in liability but ignoring a known use does not, such a standard would be illogical and inconsistent with MTCA’s plain language. Such a standard would fail to recognize that choosing to ignore a known use *is* the exercise of control over a facility.

Washington’s limited “operator” case law is consistent with this application of MTCA’s language. In *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006), Division I held that the key to operator liability is “decision-making” control. *Id.* at 128. And in *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999), *as*

performed a proprietary act. If the person is not in a position to know of the use, then it has done nothing to allow the use. Thus, a land manager with no knowledge or reason to know of an unauthorized use would not face liability under MTCA’s plain language.

⁹ There is no rational policy reason to impose liability in one situation but not the other. By choosing not to lease, a person willingly shirks its duty to prevent its land from becoming contaminated (a duty placed on DNR by statute) and avoids the administrative costs associated with leasing and supervising the land. In either case, such a person has allowed contaminating activity on its land and must be held accountable.

amended (Apr. 24, 2000), the same court avoided “impos[ing] liability on those who had no knowledge of or ability to control activities at the site.” Regardless of whether DNR had ever entered a lease, DNR unquestionably had knowledge of and the ability to control—“in the decision-making sense”—P&T’s activities at the Site. *See Taliesen*, 135 Wn. App. at 128. By making the decision to allow P&T’s continued use without formal authorization, DNR exercised that control.

B. A Standard that Requires Leasing or Similar Acts for Liability Would Incentivize Acquiescence.

If the Court held that a person with management authority “exercises any control” only when the person “affirmatively undertak[es] active management”¹⁰ at the facility, then it would create a gaping loophole for those who affirmatively choose to ignore polluting activity on land within their control. And worse, it would create an incentive for DNR and other land managers to *avoid* leasing or restricting activities when a use presents a risk of contamination. This perverse incentive would result in reduced oversight where oversight is the most necessary to protect the environment.

Ecology recognizes the risk of creating such an incentive by noting that DNR’s standard “would give lessors who have the ability to dictate

¹⁰ Ecology’s Am. Br. at 6 n.3.

and police the terms of a lease an incentive to distance themselves from regulating the uses to which their leasehold is put.” Ecology’s Am. Br. at 14. PR/OPG agrees, but it must further be recognized that, if a person with leasing authority must lease to be liable, then the person will simply choose *not* to lease. Thus, the problem of incentivizing acquiescence is not solved by a standard that requires a lease before imposing liability on a land manager, which illustrates that it would be an absurd result to distinguish between one who allows a use by ignoring it and one who grants formal authorization. *See Estate of Bunch*, 174 Wn.2d at 433 (stating that court has a duty to avoid absurd results in statutory interpretation).

III. CONCLUSION

As Ecology has recognized, this case offers the Court an excellent chance to clarify the appropriate “operator” standard under MTCA. PR/OPG agrees with Ecology that the Court should use this opportunity to ensure that lessors of land are liable, which is consistent with the statute’s plain language. PR/OPG further urges the Court to preserve the vitality of MTCA’s plain language and hold that willfully ignoring activity that a land manager knew (or should have known) of constitutes the “exercise[] of any control over the facility” under MTCA’s broad “owner or operator” definition.

RESPECTFULLY SUBMITTED this 31st day of March, 2016.

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PROOF OF SERVICE

I, Susan Bright, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

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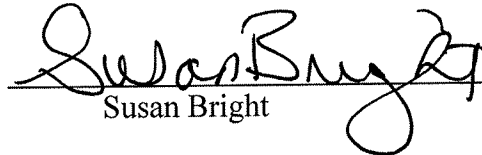
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Executed at Bellevue, Washington this 31st day of March, 2016.


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Transmittal Letter

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